No. 86-1087

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

A & E SUPPLY COMPANY, INC.,
Petitioner,

v.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
Respondent.

Reply To Brief In Opposition To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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SUMMARY OF THE ARGUMENT

This case presents a simplistic setting in which the court of appeals reversed an ambiguous jury verdict in favor of petitioner for punitive damages on the tort of conversion, contrary to state law, and denied petitioner a jury trial on its slander claim that the trial judge declared had been erroneously dismissed in his post-trial opinion. Respondent endeavors to portray the facts in a complex light and the issues as seemingly unimportant in an effort to dissuade this Court from addressing the significant questions of federal law having an obvious impact on federal--state relations.

Respondent totally ignores the most significant point raised in the Petition for Certiorari: The trial court expressly declared that it committed error in denying

petitioner the opportunity to include its slander claim in the amended complaint prior to trial. 612 F. Supp., 760, 762, n. 1 (W.D. Va. 1985). Although the trial court recognized its error in the post-trial opinion, it had no way of correcting it since petitioner prevailed on the jury verdict. Petitioner, unlike respondent, had nothing to appeal to the court of appeals. The slander claim did not become crucial until the court of appeals reversed the trial court's judgment on the other tort claims. When the court of appeals declined to remand the case to the trial court on rehearing, it deprived petitioner of its right to trial by jury on the slander claim, which respondent concedes would support a verdict for punitive damages regardless of whether compensatory or nominal damages are awarded. (Brief in Opposition, at 13.)

Respondent urges that the court of appeals properly exercised discretion in denying petitioner an opportunity to be heard on its slander claim. In doing so, respondent disregards the fact that the slander claim has never been litigated since it was not appealable in the first instance and that the court of appeals declined to remand it on rehearing after reversing the trial court's judgment in the original appeal. There is nothing in the Federal Rules of Civil Procedure or the decisions of this Court that suggests, let alone supports, such a result.

Respondent also fails to recognize that the jury did find compensatory or nominal damages for conversion under the trial court's charge. The jury simply did not fix a specific amount. The cases relied upon by respondent in its Brief in Opposition actually support petitioner's contention that the court of appeals clearly erred in overturning the punitive damage verdict because the jury failed to determine any specific compensatory damage award. *See Zedd* v. *Jenkins*, 194 Va. 704, 708-09, 74 S.E.2d 791 (1953). As respondent concedes, nominal damages are sufficient to support a punitive damage award (Brief in Opposition, at 18), and they were found by the jury under the trial court's charge.

Finally, respondent concedes that under Virginia law a

state appellate court would remand a case for a new trial due to an ambiguity in a jury verdict when justice requires clarification, especially where the ambiguity was not caused by the verdict winner. (Brief in Opposition, at 17.) Under Fed. R. Civ. P. 51, the trial court instructed on actual and punitive damages that required the jury to determine whether petitioner was "entitled to be compensated for its damages" before punitive damages could be awarded. The trial court gave this instruction in connection with the tort theory urged by petitioner. Thus, any ambiguity in the instruction was the result of respondent's failure to object to language it believed correct when the trial judge instructed the jury.

Respondent urges for the first time on appeal that petitioner should have sought additional instructions directing the jury to actually award compensatory or nominal damages for conversion before awarding punitive damages. Respondent's contention is disingenuous and is intended to distract the Court's attention from the fact that the court of appeals, sitting in diversity, denied petitioner the right to a new trial to clarify an ambiguity in the verdict recognized in state courts under Virginia law.

ARGUMENT

A. The Petitioner Could Not Cross-Appeal Its Slander Claim Which The Trial Court Held Had Been Mistakenly Taken Away From The Jury Prior To Trial.

The following facts are undisputed: First, the trial court dismissed petitioner's slander claim prior to trial as improperly pleaded in the amended complaint. 612 F. Supp. at 762, n. 1. Second, the slander claim was not separately tried before the jury along with the other tort claims, but undisputed evidence of slander was proven under general allegations of bad faith. *Id.* Third, the trial court reconsidered its ruling in its post-trial opinion and held that the slander claim should have been permitted to proceed,

although a new trial was not ordered since petitioner obtained all relief requested under the remaining tort claims. *Id.* Fourth, under Virginia law, imputation of crime, i.e., arson, constitutes slander per se and actual damages need not be proved or awarded to sustain a verdict for punitive damages. *Newspaper Publishing Corp.* v. *Burke,* 216 Va., 800, 805, 224 S.E.2d 132, 136 (1976). Fifth, the court of appeals refused to remand the slander claim to the trial court for a new trial notwithstanding its characterization of respondent's actions as *"discreditable,"* 798 F.2d 669, 672 (4th Cir. 1986), and its finding that respondent *"did not relay its unfounded suspicions [of arson] to law enforcement authorities for proper investigation . . . and told creditors [of petitioner] that [it] had burned the building to collect on [the] insurance policy."* *Id.* at 670. (Emphasis supplied.) Sixth, the court of appeals gave no reason for its ruling. (Petition for Certiorari, at App. 20a.)

On these facts, there is no question that petitioner could not cross-appeal the trial court's post-trial holding that it committed error by dismissing the slander count in the amended complaint. *See New York Telephone* v. *Maltbie,* 291 U.S. 645, 646 (1934). In effect, the trial judge held that he mistakenly denied petitioner the right to proceed on a legitimate cause of action, but found it unnecessary, and perhaps even impossible, to correct the error by way of a judgment since the jury awarded petitioner everything requested that it could have obtained on the slander claim.[1]

When the court of appeals reversed the punitive damage award on the conversion theory, it refused to give petitioner any opportunity for a new trial on its slander claim. Although the court of appeals' decision reversing the punitive damage award for conversion was incorrect (discussed *infra*), a new trial on the slander claim should have been awarded in any event. *See generally, Neely* v. *Eby*

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[1] Petitioner did cross-appeal the trial court's denial of other relief—i.e., the trial court's denial of attorney's fees and costs, its refusal to permit amendment of the ad damum seeking additional punitive damages, and its grant of judgment n.o.v. on the fraud count. But, petitioner had nothing to cross-appeal with respect to slander.

Construction Co., 386 U.S. 317 (1967).

Respondent erroneously relies upon several decisions of this Court in support of its contention that petitioner should have cross-appealed the dismissal of the slander claim. (Brief in Opposition, at 10-11.) These cases are inapposite for the reason previously stated in the Petition for Certiorari: *The trial court corrected its error in its post-trial opinion and petitioner was not seeking any relief under the slander theory that had not been awarded in the jury verdict on the other tort claims.* Under these circumstances, it is absolutely clear that petitioner could not cross-appeal on the slander claim. *New York Telephone* v. *Maltbie, supra.*

Unlike petitioner, respondent was entitled to appeal each adverse ruling of the trial court. Significantly, respondent did not appeal the trial court's ruling that it erred in dismissing the slander claim. Instead, respondent accepted the ruling and now contends that the court of appeals correctly refused to remand the slander claim that respondent implicitly admitted was valid by failing to appeal the trial court's decision.

Respondent's novel position can be reduced to the following proposition: *If a trial court dismisses a viable claim before trial and later confesses error in the dismissal, a court of appeals can reverse a judgment for the plaintiff below on another claim and refuse, without giving any reasons, to permit the plaintiff to return to the trial court to litigate the claim that was erroneously dismissed, even though the defendant below failed to challenge the trial court's determination that it should have permitted the dismissed claim to go to the jury.* Petitioner submits that this proposition is in direct conflict with *Neely, supra,* and this Court's concern for equitable treatment of verdict winners. *See Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217 (1947).

This court has not had the occasion to revisit *Neely* in twenty years. If the court of appeals' decision is left in tact, every verdict winner must henceforth cross-appeal or assert every hypothetical issue and ground for a new trial on appeal in his main brief. This would indeed be a radical departure from the principle established in *Neely* that a verdict winner can "choose for his own convenience when to make his case for a new trial" and that "he may . . .

seek rehearing from the court of appeals after his judgment has been reversed." 386 U.S. at 328-29.

B. The Court Of Appeals' Refusal To Remand The Slander Claim Denied Petitioner Its Right To Trial By Jury.

Petitioner observed in the Petition for Certiorari that the court of appeals ignored its right to a jury trial on the merits of the slander claim never reached by the trial court. *See Cone* v. *West Virginia Pulp & Paper Co., supra,* 330 U.S. at 217. The trial court found undisputed evidence of slander damaging to petitioner which "prevent[ed] the commencement of any new business and severely limit[ed] its ability to obtain credit." 612 F. Supp. at 762, n. 1. Respondent has never disputed this finding in either the court of appeals or this Court.[2] Yet, petitioner has been unable to secure a trial on the merits of its slander claim. The trial court found a trial unnecessary in light of the jury award and the court of appeals declined to remand without giving any reason for depriving petitioner of its Seventh Amendment right to trial by jury.

Unlike the plaintiff in *Neely,* who filed no petition for rehearing and failed to suggest any new trial grounds in her petition for certiorari, petitioner advised the court of appeals on rehearing that its slander claim had not been litigated due to the trial court's admitted error and inability to correct it since petitioner prevailed on the jury verdict. Petitioner cited authority clearly indicating that compensatory damages need not be proved under state law to

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[2] Respondent does suggest for the first time that the slander claim is barred by the statute of limitations (Brief in Opposition, at 11, n.5), even though the record does not reveal when the defamatory statements were made. Since the complaint was filed within several months of the loss after it was denied on the ground of arson, the slander claim in the amended complaint would not be time barred. *See* Fed. R. Civ. P. 15(c). In any event, respondent's contention is premature and should be addressed to the trial court after the slander claim is remanded.

support a punitive damage verdict for slander. *See, e.g., Newspaper Publishing Corp* v. *Burke, supra,* 216 Va. at 805. Petitioner complied with the procedure established by this Court in *Neely, supra,* 386 U.S. at 328-29, but the court of appeals both misapplied and ignored it. *See also, Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801, 808-09 & n. 8 (1949).

Respondent suggests that the court of appeals properly denied petitioner's request for a new trial on the slander claim in the exercise of its discretion under *Neely*. (Brief in Opposition, at 6.) However, the Seventh Amendment denies the court of appeals the power to simply brush away petitioner's slander claim by declining to remand it to the trial court. *Neely,* properly read, gives the court of appeals *discretion* to grant a new trial or to remand for consideration of a new trial motion when a verdict winner advances a new trial theory for the first time on appeal or rehearing. 386 U.S. at 328-29. It does not sanction denial of trial by jury on a claim properly raised and simply not reached by a trial court. Respondent's construction of *Neely,* at best, is strained and certainly does not withstand Seventh Amendment scrutiny.

C. The Court Of Appeals Refused To Give Petitioner A New Trial On Conversion That Would Have Been Given Under State Law.

Respondent recognizes that if a jury awards actual or nominal damages, it may return a verdict for punitive damages in tort. (Brief in Opposition, at 12-14.) In the instant case, the trial judge instructed the jury that if petitioner "is entitled to be compensated for its damages," then the jury "may also" award punitive damages. The jury obviously found that petitioner was entitled to compensatory or nominal damages for conversion under the trial court's charge and then awarded punitive damages. The jury did not specify the amount of actual or nominal damages because respondent did not ask for specification in the trial court's instruction. Under Fed. R. Civ. P. 51,

respondent was obliged to object to the trial court's charge to preserve this issue for appeal.

Respondent certainly understood that the trial court's instruction required the jury to find actual or nominal damages before punitive damages were awarded. Respondent did not ask the trial court to require the jury to return a specific sum because petitioner was satisfied with a finding of actual or nominal damages without any specific award. Any further instruction requiring the jury to return a specific award would have resulted in respondent's payment of additional damages beyond those actually found but not awarded under the instruction given. Once actual damages were found, the jury turned its attention to punitive damages.

Respondent agreed that the trial court's instruction was proper under Virginia law. However, the court of appeals itself resolved the abiguity in the verdict created by the absence of a specific award.[3] In doing so, the court of appeals denied petitioner the opportunity to have another jury resolve the ambiguity contrary to the Virginia Supreme Court's decision in *Zedd* v. *Jenkins, supra,* 194 Va. at 708, and this Court's decision in *Iacurci* v. *Lummus,* 387 U.S. 86 (1967). Both *Zedd* and *Iacurci* established many years ago that a plaintiff is entitled to remand due to an ambiguous jury verdict.

Respondent concedes that remand is required under *Zedd* where an ambiguity exists, but contends that the ambiguity in this case was somehow brought about by petitioner's failure to request a specific award for compensatory or nominal damages under its conversion claim. (Brief in

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[3] The court of appeals also suggested that compensatory or nominal damages in tort were not independent of the damages underlying the contract breach. 798 F.2d at 673. *But see Jefferson Coals* v. *Eagle Energy,* Record no. 860031 (Va. S. Ct., App. awarded July 28, 1986) (suggesting that state trial court erred, and district court, in present case, ruled correctly that tort compensatory damages need not be proved in addition to those underlying contract breach to support punitive damage award, 612 F. Supp. at 766-67); *see also* Petition for Certiorari at 6, n. 8.

Opposition, at 17.) Respondent suggests for the first time on appeal that an additional instruction should have been given directing the jury to award actual or nominal damages. But, Fed. R. Civ. P. 51 imposed on respondent the obligation to request an additional instruction if it believed that the one given was not adequate. Surely, this Court will not countenance a verdict loser's complaints about an instruction raised for the first time on appeal at the expense of a verdict winner who could not respond to something never advanced at trial.

The Virginia Supreme Court, like most courts, is empowered to "render final judgment upon the merits" and to remand for a new trial "when the ends of justice require it." 2 Va. Code § 8.01-681 (1984). The Virginia Supreme Court has most recently examined the statutory scope of appellate review in *Erie Ins. Exch.* v. *Meeks,* 223 Va. 287, 291, 288 S.E.2d 454, 457 (1982), reprinted herein at Appendix 1a.

In *Meeks,* the plaintiff, brought suit on a judgment against her tort-feasor's liability insurer. The insurer denied liability contending that its insured breached the "notice" and "suit-papers" provisions of the policy. The trial court held that the insurer had the burden to prove lack of cooperation and prejudice under the state insurance code, and the plaintiff, therefore, offered no evidence that the insured complied with the provisions of the policy.

On appeal, the insurer contended that the plaintiff failed to make out a *prima facie* case due to the deficiency in the evidence and that the court should reverse and dismiss the action rather than remand it. The Virginia Supreme Court observed that "as a practical matter, once the trial court made its ruling on burden of proof and announced its interpretation of the [state insurance code], proof that [the insured] had performed the conditions precedent to recovery under his policy became superfluous." 223 Va. at 291. The Supreme Court accordingly held that "the ends of justice require a new trial." *Id.*

Had the instant case been tried in state court where it was originally filed, the Virginia Supreme Court may have

reversed the punitive damage award in the absence of a specific award for compensatory or nominal damages in tort. *But see* n.3, *supra.* However, it certainly would have remanded the case for a new trial in the *"interests of justice"* due to the ambiguity in the verdict and the trial court's ruling. *Id.; Zedd,* 194 Va. at 707-08; *Meeks,* 223 Va. at 291. In short, remand is completely consistent with this Court's holding in *Neely* that litigation should not be terminated when circumstances exist analogous to those in this case. *See* 386 U.S. at 327.

CONCLUSION

Petitioner respectfully asks this Court to grant the Petition and to reverse the decision of the Court of Appeals for the reasons stated herein and those previously assigned in the Petition for Certiorari.

Respectfully submitted,
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APPENDIX

Erie Ins. Exch. v. Meeks, 223 Va. 287.

Syllabus.

Richmond

ERIE INSURANCE EXCHANGE

V.

DORIS PAULINE MEEKS

March 12, 1982.

Record No. 791278.

Appeal from a judgment of the Circuit Court of Louisa County. Hon. Harold H. Purcell, judge presiding.

Reversed and remanded.

Russell H. Roberts (Roberts, Crosley, Haley & Ashby, on brief), for appellant.

Buford M. Parson, Jr. (Patrick J. Nooney; W. W. Whitlock; May, Miller and Parsons, on brief), for appellee.

POFF, J., delivered the opinion of the Court.

In February, 1976, Doris P. Meeks was injured when rocks thrown by the wheels of a car operated by Robert A. Foley broke the windshield of the car in which she was riding. Foley did not stop, and Meeks followed him to his place of employment. Foley gave her a fictitious name, asked her not to report the incident, and assured her that he would have his insurance company contact her. Upon Meek's complaint, Foley was convicted of reckless driving.

In February 1977, papers in a tort action filed by Meeks were served on Foley. Government Employees Insurance Company (GEICO), Meek's uninsured motorists carrier, filed an answer, and trial was set for May 5, 1977. Pre-trial

depositions disclosed that Foley had a standard automobile liability insurance policy with Erie Insurance Exchange (Erie) on the day of the accident. On April 22, 1977, GEICO notified Erie of the accident, the pending tort action, and the date fixed for trial and mailed Erie copies of the suit papers.

On May 2, 1977, GEICO settled Meek's claim and its counsel withdrew from the case. Erie refused an offer of continuance and declined to defend the tort action, and the trial court entered a default judgment against Foley in the sum of $30,000.

Meeks then brought an action against Erie to enforce Foley's contractual rights. Meeks alleged that Erie "has wrongfully denied coverage to Robert A. Foley" and that Meek's tort judgment "remains outstanding and is the obligation of [Erie] to satisfy under the terms of the aforesaid policy". In its grounds of defense, Erie admitted that Foley's policy was in effect on the date of the accident but denied liability.

Adopting Meek's argument, the trial court ruled that, in light of Erie's admission, Meeks was not required to prove the terms of the contract; that Erie bore the burden of proving, as an affirmative defense, that Foley had failed to comply with the terms of the policy; and that Erie should present its evidence first. Erie objected to the ruling and offered a motion to strike. The motion was overruled, and Erie introduced the policy as an exhibit. The policy required Foley to give Erie "written notice" of an accident "as soon as practicable" and to "immediately forward" papers in any claim or suit filed against him. Erie called two witnesses who testified that Foley had never notified Erie of the accident or forwarded the papers in the tort action and that Erie had not learned what had happened until contacted by GEICO more than a year after the accident.

[1] At the conclusion of Erie's evidence, Erie renewed its motion to strike because Meeks had presented no evidence. The trial court overruled the motion. Meeks moved to strike Erie's evidence on the ground Erie had failed to prove prejudice. Meeks argued that Code § 38.1-381 as amended in 1966 requires an insurer to prove prejudice in order to deny coverage for breach of the notice

and suit-papers provisions of an automobile liability insurance policy. The trial court agreed, sustained the motion, and, by order entered June 14, 1979, granted Meeks summary judgment in the amount of the judgment Meeks had acquired in the tort action.

The first question we consider is whether the trial court erred in its construction and application of the 1966 amendment. As Meeks acknowledged in oral argument, this question is controlled by our decision in *State Farm* v. *Porter,* 221 Va. 592, 272 S.E.2d 196 (1980). There, we were asked to construe the 1966 amendment which, in effect, requires an insurer to prove prejudice before it has the right to deny coverage because of an insured's "failure or refusal . . . to cooperate with the insurer under the terms of the policy". Acts 1966, c. 182.[1]. We held that the General Assembly intended this amendment to apply only to the "cooperation" clause of the policy[2] and that "[t]he giving of notice of the accident, the giving of notice of suit, and the forwarding of suit papers were conditions precedent to coverage under the policy, requiring substantial compliance by the insured." 221 Va. at 599, 272 S.E.2d at 200; *accord, Liberty Mutual Ins. Co.* v. *Safeco,* 223 Va. 317, 288 S.E.2d 469 (1982).

Meeks urges us to "reconsider" this decision. We have done so, and, reaffirming our reasoning there, we hold that the trial court erred in its construction and application of the 1966 amendment.

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[1] Under this Act, Code § 38.1-381(al) read in pertinent part as follows: (al) Nor shall any such policy . . . be so issued . . . unless it contains an endorsement or provision insuring the named insured and any other person responsible for the use of . . . the motor vehicle . . . notwithstanding the failure or refusal of the named insured or such other person to cooperate with the insurer under the terms of the policy; provided, however, that if such failure or refusal prejudices the insurer in the defense of an action for damages arising from the operation or use of such motor vehicle, then this endorsement or provision shall be void.

[2] An amendment with similar effect, not applicable to *Porter* or the instant case, was addressed to the suit-papers provision by Acts 1980, c. 331.

[2] We now consider the trial court's ruling that Erie had to bear the original burden of proof. As we noted in *Porter,* we had held in several cases (all decided before the instant case was tried) that "performance" by the insured of the obligations imposed by the policy is "a condition precedent to recovery under the policy." *Id.* at 597, 272 S.E.2d at 199. As the trial court observed, Erie asserted an affirmative defense. With respect to such a defense, a defendant bears the ultimate burden of persuasion and assumes the risk of non-persuasion.

However, Erie did not bear the *initial* burden of going forward with the evidence as the trial court ruled. It is elemental that a plaintiff must prove a *prima facie* case. In her action to enforce Foley's rights under his contract, Meeks stood in Foley's shoes. In that posture, she alleged that Erie had "wrongfully denied coverage" and, thus, was in breach of the covenant to pay the tort judgment against Foley. It was Meek's burden to introduce evidence to support those allegations. Only after she had made a *prima facie* case that Foley had performed the conditions precedent to recovery would the burden of persuasion have fallen upon Erie. Accordingly, we hold that the trial court erred in its ruling.

[3] For the errors committed below, we will reverse the judgment in this case. Meeks argues that, since the judgment was entered before we issued our mandate in *Porter,* this case should be remanded for a new trial to afford her an opportunity to prove that Foley substantially performed the notice and suit-papers requirements of his policy.

When we reverse an erroneous judgment, we are empowered to "render final judgment upon the merits whenever, in the opinion of the court, the facts before it are such as to enable the Court to attain the ends of justice", and "[a] civil case shall not be remanded for a trial de novo except when the ends of justice require it". Code § 8.01-681. Construing a predecessor statute, we reversed and entered final judgment when we found, "no reason to believe that, upon another trial, any new or different evidence might be introduced which ought to affect the result." *A.C.L.R. Co.* v. *Walkup Co.,* 132 Va. 386, 395, 112 S.E. 663, 666 (1922). *See also Virginia Iron, Etc. Co.* v. *Odle's*

Adm'r, 128 Va. 280, 310-11, 105 S.E. 107, 117 (1920).

As a practical matter, once the trial court made its ruling on burden of proof and announced its interpretation of the 1966 amendment, proof that Foley had performed the conditions precedent to recovery under his policy became superfluous. Meeks had subpoenaed Foley as a witness at trial. In opening statement, Meek's counsel had told the jury that Foley would testify and that his testimony would supply such proof. Accordingly, we have reason to believe that, upon another trial, Foley's testimony might be introduced and, if believed, could affect a jury's verdict in this case. Hence, we are of opinion the ends of justice require a new trial.

The judgment will be reversed and the case remanded for a new trial, limited to the question whether Foley substantially performed the notice and suit-papers requirements of his policy. *See Glens Falls Indemnity Co.* v. *Harris,* 168 Va. 438, 191 S.E. 644 (1937) (insured's judgment reversed, case remanded, new trial limited to question of timely notice of injury).

Reversed and remanded.